DOES LAWFUL ACT DURESS STILL EXIST?

WHEN can a threat to do something lawful constitute economic duress? It seems like a simple enough question, but it is one with which the courts have continued to struggle. The Court of Appeal in *Times Travel (UK) Limited v Pakistan International Airlines Corporation* [2019] EWCA Civ 838 (*TT v PIAC*), has recently provided guidance on when a lawful threat will *not* constitute economic duress. It held that a threat made in good faith by a company in a monopoly situation did not constitute illegitimate pressure for the purposes of economic duress, even if that threat were potentially unreasonable. Considering the rarity of successful lawful act duress cases, *TT v PIAC* is a leading decision on the (limited) circumstances where a threat to do something lawful can render a contract subsequently entered into voidable.

Times Travel (TT) was a small family-owned travel agency in Birmingham. Its business predominately sold return flights to Pakistan, and Pakistan International Airlines Corporation (PIAC) was the only provider of direct flights between London and Pakistan. TT was therefore highly reliant on PIAC and would have been unable to continue business without selling PIAC tickets. In 2008, TT entered into an agreement with PIAC whereby it was authorised to sell tickets ("the Original Agreement"). The commission rate was initially 9% of the ticket price with additional commission payments as an incentive for total sales. The Original Agreement also gave both parties the right to terminate on one month's notice. There were ongoing issues with the commission structure and payment and, later in 2008, a trade union of PIAC-appointed agents formed to negotiate a deal with the airline. During this period TT regularly chased PIAC for payment of outstanding commission. PIAC reassured TT that, despite the introduction of a new commission scheme, the outstanding commission would be paid.

In 2010 the trade union threatened legal proceedings against PIAC. PIAC advised TT not to get involved in this dispute and reassured it that a solution would be reached. On 14 September 2012, PIAC sent a notice of termination to all UK agents, including TT. This notice also set out the terms of re-appointment ("the New Agreement"). TT had earlier asked for a copy of the New Agreement, with a view to obtaining legal advice in relation to it, but this was refused. A few days later PIAC reduced TT's allocation of tickets from 300 per fortnight to 60 until the New Agreement was signed, which occurred on 24 September 2012. This agreement provided for a 7% commission which was only payable after specific sales targets were met. The initial period of the New Agreement was 6 months, but PIAC orally agreed that it would run "well into the future". The New Agreement also released PIAC from all claims to unpaid commission or remuneration arising out of the Original Agreement. PIAC indicated that if TT did not sign the New Agreement, the travel agent would no longer be able to sell PIAC tickets.

At first instance, it was held that TT was entitled to avoid the New Agreement on the grounds of lawful act economic duress. Warren J. outlined the three elements of economic duress: (i) illegitimate pressure on the claimant, where that pressure was (ii) a significant cause of the contract being made, and (iii) the claimant had no reasonable alternative but to enter into the contract. Despite the fact PIAC had not acted unlawfully, at first instance Warren J. held that the combination of factors was sufficient for a finding of economic duress. The judge stated that it was "moot" whether PIAC had acted in good or bad faith. He held that the claimants had not established bad faith, and that different minds would have competing views on whether the airline's actions amounted to bad faith. Instead, he attached particular significance to the fact that while TT's benefit from the New Agreement was sufficient to justify the new arrangements going forward, it was inadequate for TT to waive existing claims against PIAC.

The Court of Appeal overturned the High Court decision. PIAC did not challenge the judge's finding that the second and third elements were present in the case. The only issue to be considered was whether TT was subject to illegitimate pressure, which required looking both at the nature of the threat and the nature of the demand. The Court of Appeal commented that if the threated action is lawful (such as PIAC's threat to reduce TT's ticket allocation), the nature of the demand must be considered. It further held that lawful demands made in good faith could not constitute illegitimate pressure for the purposes of economic duress. When determining good faith, the focus would be on whether the demand was made honestly as opposed to reasonably. The extent of 'reasonableness' was not however tested, thus leaving open the question of whether a demand made with an absurd – but honestly held – belief of legal entitlement could be categorised as legitimate pressure.

A further issue left open in the wake of the Court of Appeal's decision is the difficulty in defining when a demand is made in "good faith". It seems that PIAC's belief (reasonable or otherwise) that it was entitled to retain the unpaid commission was sufficient for the court to hold that the demand was made in good faith. Nothing else appeared to be necessary for this finding and there was limited analysis of the foundations of good faith. As the English courts are still in the process of developing these principles, there is a potential danger in relying on the absence of good faith when determining what constitutes economic duress (see also comments from Leggatt J. in *Al Nehayan v Kent* [2018] EWHC 333 (Comm)).

Referring to *CTN Cash and Carry Ltd v Gallagher Ltd* [1994] 4 All ER 714*,* the Court of Appeal's decision was also premised on the basis that whilst lawful act duress is possible, it would be "unprincipled to develop the doctrine of economic duress as a means of controlling the lawful use of monopoly power" [107]. Putting aside the debate about whether the common law does and should regulate this type of power, the role of economic duress is to prevent the *mis*use of power – including when it arises from a monopoly position. Just because PIAC was a monopoly, it does not mean that the company should be afforded free rein to utilise its privileged position without fear of an economic duress finding. There were many actions from PIAC that appear to go beyond mere use of a monopoly power and could easily be interpreted as *mis*use of its position justifying a finding of illegitimate pressure. These include: reassuring TT that outstanding commission would be paid; encouraging TT not to get involved with the trade union; reducing the ticket allocation until TT signed the New Agreement; not allowing TT a copy of the New Agreement to obtain legal advice; and using the New Agreement to release PIAC from liability for outstanding commission that had validly accrued under previous agreements. Hopefully, even in the world of commercial bargaining, these actions can clearly be "distinguished from the rough and tumble of the pressures of normal commercial bargaining" (*DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] BLR 530 [131], Dyson J.).

It is surprising that the Court of Appeal was not directed to the case law on economic duress in salvage cases, since an interesting parallel can be drawn. In salvage cases, the court can set aside or amend an otherwise binding contract if the ship in distress was so desperate that they had no alternative but to consent to a salvage agreement that was inequitable, disproportionate or exorbitant (J. Reeder (ed.), *Brice on Maritime Law of Salvage,* 5th edn (London 2012), [5-121]-[5-127]). In *The Cargo Ex Woosung* (1876) 1 P.D. 260, a ship was wrecked on a reef and the Captain entered into an agreement with the salvage boat to give over half the value of any items saved. This was significantly more than standard salvage agreements, but it was unlikely that any other ship would reach *The Woosung* in time to assist. After the salvage was completed, the Captain refused to pay the agreed amount and offered a sum closer to standard salvage agreements. The Court of Appeal held the transaction to be unenforceable.

Even though the captain was "perfectly capable of understanding" the nature and consequences of the salvage agreement, the agreement was not enforced as the Captain had no choice but to accept "the lesser evil of losing a portion of the profit and property being submitted to rather than the greater evil of losing all" (at 265).

A strong parallel can be drawn between the desperate situation of TT, a small business dependent on PIAC to survive, and a sinking ship needing help to salvage items in peril. In the latter case, despite the complete legality of the salvage agreement obtained, the boat was not entitled to the spoils of the contract. The court justified intervention not on the ground of fettering the lawful use of the salvage boat's monopoly position, but on the fact that the salvage boat took advantage of a situation and utilised its position to obtain a disproportionate benefit. Whilst the lawful use of a monopoly position will not necessarily ground lawful act duress, could it not be argued that the *mis*use of such power ought to entitle the court to analyse the outcome of the agreement reached and consider a finding of lawful act duress.

Those who strongly value commercial certainty will welcome this decision as a continued focus on orthodox freedom of contract principles. Those who believe that contract law can and should be used as a tool to set a minimum standard of acceptable behaviour may despair that this decision could be the removal of another plank from beneath the feet of lawful act duress.

JODI GARDNER
Address for correspondence: St John's College, Cambridge CB2 1TP. Email: jsg61@cam.ac.uk.